Robert Novak
1550 Sunrise Hwy | Copiague, New York 11726 | 631.789.5400 Fax 631.789.9340

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y
★ MAR 02 2005 ★
LONG ISLAND OFFICE

March 1, 2005

Honorable Judge Denis R. Hurley, U.S.D.J.
United States District Court
Long Island Federal Courthouse
843 federal Plaza

Re: Novak v. Google Inc, et al. No. CV 02 5164

Dear Judge Hurley,

In opposition to defendant Google's request for a pre-motion conference for reconsideration under rule 59(e) alternatively an award of attorney's fees under 15 U.S.C. § 1117.

Google has already had a *second bite* of the apple when this court graciously granted this only remaining defendant an opportunity by it's Order dated January 20th to present it's arguments on the very same issues.

Now given that opportunity and failing to receive their desired results by this Court, comes up with an unsigned faxed memo, which they interpret as "new evidence".

Mr. Kramer & Mr. Slafsky are acting like petulant children.

Nothing could be further from the facts already presented to the court.

Since the onset of this litigation defendant's counsel and the plaintiff have exchanged digs and barbs on the phone, in person and through many letters not before the Court.

Google's perceived threat that plaintiff will bring on another action is miss placed. That possibility was fully disclosed to this Court in plaintiff's moving papers on February 7, 2005

Wherein I stated "The reasons I desire to dismiss the case against the defendant are strategic. This defendant is defending the very same allegations of trademark infringement worldwide most notably in the SDNY by American Blind and Wallpaper 04-642 and Government Employees Insurance company (Geico) in the ED of Virginia 04-507. Google has also filed a complaint for Declaratory Judgment for Non-infringement in the ND of California 03-5340 against American Blinds all based on the same exact type of infringement.

I was awaiting a positive decision in the high profile Geico case which had gone in Geico's favor until trial in December of '04, based on that unfavorable decision and the American Blind and the declaratory judgment not as of yet being decided I felt that waiting for the ripening of those lawsuits would enable plaintiff to have precedent to come back to this Court an refile if those courts found infringement. "

Therefore, the memo received after this Courts Order dated February 16, 2005 that triggered Google for a reconsideration motion is old news, not new news.

I believe it is vexatious and in bad faith, they have not cited case law in support..

To succeed on a F.R.C.P. 59(e) motion, the moving party must demonstrate an intervening change of controlling law, availability of new evidence, or the need to correct a clear error to prevent manifest injustice. Virgin Atlantic Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2nd Cir 1992). *See also*, National Ctr. for Mfg. Sciences v. Department of Defense, 199 F.3d 507, 511 (D.C.Cir. 2000). Reconsideration is discretionary and should not be granted where the moving party is simply attempting to renew factual or legal arguments, which it asserted in the original pleadings and that already were rejected by the Court. *See* New York v. United States, 880 F.Supp. 37, 38 (D.D.C.1995).

In general, "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." 11 Charles A. Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2810.1, at 124 (2nd ed.1995).

Given this standard, litigants cannot use motions for reconsideration "to raise arguments which could have been raised prior to the issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance." Pac. Ins. Co., 148 F.3d at 403. also in Hanover Ins. Co. v. Corrpro Cos., 221 F.R.D. 458, 460 (E.D. Va. 2004)."does not "provide a party with a mechanism to just keep filing motions with new theories until it gets its right."

Google now raises for the FIRST time a totally new claim for attorney's fees. I believe that claim is barred *res judicata*.

Since Mr. Kramer has no new evidence, had not cited any case law to support his theories.

Both variants must fail as matter of law.

Conclusion.

Plaintiff requests that this court deny defendant Google's motion for reconsideration and this Courts Memorandum & Order dated February 16, 2005 remain undisturbed.

Respectfully submitted,

Robert Novak

CC: by mail WSGR
650 Page Mill Rd
Palo Alto, CA 94304